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IN THE

SUPREME COURT OF THE UNITED STATES

No. 762

OCTOBER TERM, 1940

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JOHN H. McGLOON,
Petitioner,
against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

February 10, 1941.

FRED A. IRONSIDE, JR.,
Solicitor and Counsel for Petitioner.

Appeal Printing Co., Inc., 130 Cedar St., New York

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IN THE

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OCTOBER TERM, 1940

JOHN H. McGLOON,
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against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, John H. McGloon, respectfully represents to the Court:

I. That on the 15th day of January, 1941, the Circuit Court of Appeals unanimously affirmed a judgment of conviction in a criminal cause against petitioner, which had been entered in the District Court of the United States for the Southern District of New York, after a

trial before Honorable Grover M. Moscowitz, United States District Judge, and a jury (fols. 5-7, incl., p. 65, fol. 66).

II. The judgment was entered upon the Thirteenth Count of an indictment which contained fourteen counts. The indictment charged ten separate violations of the Mail Fraud Statute (18 U.S.C.A. Sec. 338), under separate counts; a conspiracy to violate the Mail Fraud Statute and the Securities Exchange Act of 1934 (18 U.S.C.A. Sec. 88) under one count; and three separate violations of the Securities Exchange Act of 1934 (15 U.S.C.A. Secs. 78m and 78ff), under three counts (fols. 8-96, incl.). Petitioner was acquitted by the jury on all counts of the indictment except Count Thirteenth, upon which count the jury returned a verdict of guilty (fols. 6-7, 110).

The count of the indictment upon which the judgment of conviction was entered charged that petitioner and others, named and unnamed, on or about April 29, 1938, unlawfully did make and cause to be made, false and misleading statements with respect to material facts in certain applications, documents and reports filed and required to be filed with the New York Stock Exchange by the Securities Exchange Act of 1934 and in accordance with the rules and regulations prescribed by the Securities and Exchange Commission (fols. 67-70, incl.).

III. Petitioner was sentenced under the judgment to imprisonment for a term of one year and one day, and to pay a fine of Five Thousand Dollars ($5,000), petitioner to stand committed until the fine is paid (fol. 7).

IV. Under the assignment of errors filed below on behalf of petitioner, argument was presented in the Cir-

cuit Court of Appeals, both oral and written, urging that the allegations of the indictment are insufficient to charge an offense and are insufficient to support the judgment of conviction thereon, for the following reasons:

(1) The portion of the penal statute under which the indictment was drawn is unconstitutional in that it sets up no ascertainable and immutable standard of guilt.

(2) The facts alleged in the indictment are insufficient to charge the commission of a crime for the reasons that: (a) The indictment fails to charge an offense by failing to allege that petitioner wilfully and knowingly made any statement in any application, report or document required to be filed, which statement was false or misleading with respect to any material fact. (b) The indictment fails to allege an essential element of the offense; to wit, that petitioner knew the statements charged therein were false and made them with knowledge of their falsity. (c) The indictment fails to allege an essential element of the offense; to wit, that petitioner knew the applications, documents and reports were instruments required to be filed by the Securities Exchange Act. (d) The indictment is insufficient in that it pleads only conclusions and not ultimate facts constituting an offense, and is indefinite, uncertain and ambiguous.

Jurisdiction

The decision affirming the judgment of conviction was made on the 30th day of December, 1940, and the judgment of the Circuit Court of Appeals thereon was entered on the 15th day of January, 1941 (pp. 65-66, fols. 65-66). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28

U.S.C.A. Sec. 347(a)), and under the Rules of Practice and Procedure in Criminal Cases promulgated May 7, 1934.

The Circuit Court of Appeals affirmed judgment of conviction, per curiam, without opinion (p. 65, fol. 65).

Questions Presented

V. The following questions are presented for review by this Court:

1. Whether that portion of the penal statute, under which the Thirteenth Count of the indictment was drawn, is void and unconstitutional for failure to set up an ascertainable and immutable standard of guilt.

2. Whether the facts alleged in the indictment (Thirteenth Count) are sufficient in law to charge an offense against the United States, and sufficient to support the judgment of conviction thereon.

As to the First Question Presented

The charges set forth in the Thirteenth Count of the indictment are based upon two provisions of the Securities Exchange Act of 1934. One provides for the filing of periodical and other reports in accordance with the rules and regulations of the Securities and Exchange Commission (15 U.S.C.A. Sec. 78m). The other provides for the punishment of any person who knowingly and willfully makes a material false statement in any application, report or document required to be filed by statute or regulations of the Securities and Exchange Commission (15 U.S.C.A. Sec. 78ff).

The indictment, however, fails to allege facts bringing the petitioner within any of the provisions of the statute.

No facts are alleged showing that he was an issuer of or dealer in securities, and it does not appear that he was a person subject to the provisions of Section 78m and required to file information, documents or reports in accordance with rules of the Commission. He is not described as a member of an exchange or a broker. The pleading fails to disclose that he is a person subject to the provisions of the Securities Exchange Act. He cannot, therefore, be subject to the penal provisions of the Act. Such statute can only be considered to refer to persons who are issuers of securities, exchanges, brokers, dealers or persons engaged in the securities business. The petitioner is nowhere identified in the indictment as a person required to comply with the Act.

If amenable at all to the Act, petitioner is made so by the provision empowering the Securities and Exchange Commission to promulgate rules and regulations in respect of its enforcement (15 U.S.C.A. Sec. 78w). Thus, the indictment charges petitioner with making certain false and misleading statements with respect to material facts in unspecified applications, documents and reports required to be filed with the New York Stock Exchange by the Securities Exchange Act and in accordance with the rules and regulations prescribed by the Commission. However, it does not appear in the indictment that the petitioner is a person who is subject to such rules and regulations.

An examination of the statute shows, as will be developed more fully in the supporting brief herein, that the delegation by Congress to the Securities and Exchange Commission of the power to make rules and regulations, the violation of which shall constitute and be punished as an offense, is not circumscribed by those

definite standards and limitations necessary to validate a delegation of such power to an administrative agency of the Government, and is therefore unconstitutional.

As to the Second Question Presented

The indictment seeks to bring the charge within the provisions of the penal section of the Securities Exchange Act of 1934 (15 U.S.C.A. Sec. 78ff), which is set forth in the appendix *infra* at page 23.

This statute condemns the making of a statement *in* any application, report or document required to be filed which statement was false or misleading with respect to any material fact.

The indictment, however, attempts to charge as a crime the alleged making of "false and misleading statements with respect to material facts in certain applications, documents and reports filed * * * with the New York Stock Exchange * * *". No charge anywhere appears that the petitioner made a statement *in* any application, report or document. The charge, if anything, is that McGloon made a statement "with respect to material facts" in some unspecified writing. In other words, he is charged only with having made false statements about something that was in the applications, reports and documents. He is not charged with making false statements *in* the writings themselves. The facts alleged are consistent with innocence. The elements of the crime are therefore not alleged.

Reasons for Granting the Writ

VI. Your petitioner respectfully urges that, as shown above and as will be more fully urged in the brief accompanying this petition, the Circuit Court of Appeals in

this cause has rendered a decision in conflict with applicable decisions of this Court; has decided an important question of constitutional law in conflict with the weight of authority; and that the judgment presented for review has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the United States Circuit Court of Appeals affirming the judgment in this cause may be reversed, and that petitioner may have such other and further relief in the premises as this Court may deem appropriate.

Dated, New York, N. Y., February 10, 1941.

JOHN H. MCGLOON,
Petitioner,

By FRED A. IRONSIDE, JR.,
Solicitor and Counsel for Petitioner.

Affidavit of John H. McGloon.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
STATE OF NEW YORK, COUNTY OF NEW YORK.

JOHN H. McGLOON,
Petitioner,
against
THE UNITED STATES OF AMERICA,
Respondent.

State of New York }
County of New York } ss.:

JOHN H. McGLOON, being duly sworn, says:

I am the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

JOHN H. McGLOON.

Sworn to before me this 10th }
day of February, 1941. }

MARGARET M. FOLEY,
Notary Public,
Bronx County.

State of New York }
County of New York } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

FRED A. IRONSIDE, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

No.

OCTOBER TERM, 1940

JOHN H. McGLOON,
Petitioner,

against

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement

The arguments addressed to the questions presented by the foregoing petition will be developed in the within brief more fully than was possible without unduly lengthening the petition itself.

Jurisdiction

The decision affirming the judgment of conviction was made on the 30th day of December, 1940, and the judgment of the United States Circuit Court of Appeals was

entered on the 15th day of January, 1941 (pp. 65-66, fols. 65-66). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 U.S.C.A. Sec. 347(a)), and under the Rules of Practice and Procedure in Criminal Cases promulgated May 7, 1934.

The Statutes Involved

The statutes involved are set forth in the Appendix, *infra,* page 23.

POINT I

That portion of the penal statute under which the indictment is drawn is unconstitutional in that it sets up no ascertainable and immutable standard of guilt.

The Securities Exchange Act of 1934 (15 U.S.C.A. Chap. 2B) was enacted to provide what was felt to be necessary regulation of securities transactions. The necessity for such regulation is proclaimed in Section 2 of the Act (15 U.S.C.A. Sec. 78b). The Act contains further provisions relating to transactions on registered and unregistered exchanges and exemptions from the requirements of registration (15 U.S.C.A. Secs. 78e and 78f).

There is also a provision, referred to in the indictment, relating to the filing with securities exchanges of periodical and other reports under rules and regulations prescribed by the Securities and Exchange Commission (15 U.S.C.A. Sec. 78m).

The latter provision directs the issuer of a security registered on a national securities exchange to file information, documents and reports with the exchange in

accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security. The statute does not, as its language would lead one to believe, specify in this section or elsewhere the information, documents or reports required to be filed, but leaves it to the Commission to require by appropriate rule the filing of such information, documents and reports as it may see fit.

This section and 15 U.S.C.A. Section 78w, together with the penal provision (15 U.S.C.A. Sec. 78ff), appear to be the basis for the charge in the indictment. The penal provision makes it an offense for any person wilfully and knowingly to make a statement *in* an application, report or document required to be filed under this Act or any rule or regulation promulgated thereunder, which statement is false or misleading with respect to a material fact.

The power of the Securities Exchange Commission to make rules and regulations necessary for the execution of the functions vested in it by the Act is contained in Section 23 of the Act, as amended (15 U.S.C.A. Sec. 78w).

The foregoing section when read in conjunction with the powers vested in the Commission under Section 78m, subdivision (b) clearly demonstrates that the Commission has the power of making rules and regulations to promote the legislative object at hand, a violation of which shall be deemed a crime under the provisions of 15 U.S.C.A. Section 78ff.

However, one scans the indictment upon which the judgment of conviction herein was entered in vain in an effort to find anything therein contained which brings petitioner within the provisions of the statute. It does

not allege any facts showing that he was an issuer of securities, and it does not appear that he was a person subject to the provisions of Section 78m and required to file information, documents or reports in accordance with rules of the Commission. He is not described in the indictment as a member of an exchange or a broker, or dealer in securities. There are no allegations of any kind to show that he is subject to the provisions of the Securities Exchange Act, and he is, therefore, not included within the provisions of the penal statute which can only be considered to refer to persons who are issuers of securities, exchanges, brokers or persons engaged in the securities business. Petitioner is therefore not identified in the indictment as a person required to comply with the Act.

If amenable at all to the Act, petitioner is made so by the provision empowering the Securities and Exchange Commission to promulgate rules and regulations in respect of its enforcement. Thus, the indictment charges petitioner with making certain false and misleading statements with respect to material facts in certain unspecified applications, documents and reports required to be filed with the New York Stock Exchange in accordance with the rules and regulations of the Commission; but it nowhere appears in the indictment that petitioner is a person who is subject to such rules and regulations. An examination of the statute shows that the delegation by Congress to the Securities and Exchange Commission of this power to make rules and regulations, a violation of which shall constitute and be punished as an offense, is not circumscribed by those definite standards and limitations necessary to validate a delegation of power to an administrative agency of the executive branch of the Government, and is therefore unconstitutional.

While it is true that Congress may empower governmental agencies to issue rules and regulations having the force of law, for the violation of which one may be punished, nevertheless, such delegation of authority must be confined within certain definite statutory limits. In other words, there must be a definite, ascertainable and immutable standard of guilt set up in the statute itself, so that the public may know what is forbidden and what permissible. (*United States* v. *L. Cohen Grocery Co.* (1921), 255 U. S. 81.)

The statute cannot, as it undertakes to do here, simply say that when the Securities and Exchange Commission in its judgment requires a certain thing to be done, failure to do it shall be a crime, or that when the Commission orders a thing done in a certain way, failure to do it precisely that way shall be punished as a crime. For to do so, obviously, is to put the citizen in a position where he cannot tell from an examination of the statute whether what he is doing or proposes doing is a criminal act. Conduct may not be declared criminal by the declaration or ruling of an administrative agency which is a part of the executive branch of the Government.

The Congress alone can define crimes. However, a governmental agency can, within the definite statutory limits set by Congress, make rules, the violation of which may constitute an offense, provided that Congress has by statute placed the necessary limitations upon the rule making power. Manifestly, Congress cannot say, as it tries to do so in the instant case, that disobedience to whatever the Securities and Exchange Commission ordains or may in the future choose to ordain in respect of the filing of any documents with a national securities exchange upon which an issue of stock is registered, shall be a crime and punishable as such. To validate such a delegation of

authority is not only to say that Congress by a general declaration on a subject can abdicate to the executive branch of the Government the purely legislative function of defining crimes, but also that the legality or illegality of a given act shall depend upon the changing edicts and variant views of an administrative body.

As was said by this Court in *United States* v. *Eaton* (1892), 144 U. S. 677 at page 688:

> "Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence."

The statute under consideration is plainly lacking in that ingredient of precision so essential to the lawful exercise of the legislative will in respect of the conduct of citizens. No bounds or limits are set up on the roving ambition for power of the executive arm of the Government. What the citizen is to be allowed to do is not prescribed by statute, nor has the Congress even sketched in the broad outlines of the restraints sought to be imposed, leaving it to the Commission to fill in the details. Instead, it has in one provision attempted to vest in the Commission authority to prescribe certain forms of conduct, without anywhere undertaking to place limits upon the scope of that authority, and in the other provision to punish as criminal all wilful and knowing departures from such administratively prescribed forms of conduct. In other

words, the statute leaves it to the Commission exclusively to prescribe the rules of conduct, and all that Congress has done is to say what the punishment shall be for infractions of such rules. Under this arrangement, the test of criminality is dependent not upon a fixed objective standard set out in the statute itself, but upon the subjective and shifting criteria of an administrative branch of the executive arm of the Government. Such variable standards of conduct, changing with the philosophy and viewpoint of the Commission's personnel and with the passing of time, leave even the most prudent and law-abiding citizen in doubt as to the legality of a contemplated course of conduct. The nature of the power attempted to be delegated is so broad and unrestricted that one can only conjecture what and where its changing applications will be. In short, the citizen is left to guess whether a given course will be lawful or unlawful for him to pursue, for nowhere in the statute will he find a fixed line of demarcation between what is lawful and what is criminal.

As this Court said in *Jones* v. *Securities and Exchange Commission* (1936), 298 U. S. 1, 23-24, where the Commission sought to pursue a stop order proceeding and compel the petitioner to produce books and records and give testimony after he had withdrawn a registration statement before its effective date:

> "The action of the Commission finds no support in right, principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official

> discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd* v. *United States,* 116 U. S. 616, 635, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. * * * It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*' ''

Such a delegation of authority as that attempted in the case at bar is unconstitutional. Similar attempts in the past to delegate authority in this manner have been struck down by the Courts as an improper surrender of a legislative function by the Congress to the executive branch of the Government, and as failing to provide that element of definiteness and certainty which is so necessary to insure full protection to the rights of the accused.

> *United States* v. *L. Cohen Grocery Co., supra;*
> *A. B. Small Co.* v. *American Sugar Refining Co.* (1925), 267 U. S. 233;
> *International Harvester Co.* v. *Kentucky* (1914), 234 U. S. 216;
> *American Seeding Machine Co.* v. *Kentucky* (1915), 236 U. S. 660, 662;
> *Weeds Inc., et al.* v. *United States* (1921), 255 U. S. 109.

POINT II

The indictment fails to charge the commission of a crime.

The indictment seeks to bring the charge within the provisions of the penal section of the Securities Exchange Act of 1934, which, insofar as is here material, provides as follows (15 U.S.C.A. Sec. 78ff):

> "Any person who willfully and knowingly makes * * * any statement in any application, report or document required to be filed * * * which statement was false or misleading with respect to any material fact * * *"

shall be punished in the manner therein prescribed.

Thus, the statute condemns the making of a statement *in* any application, report or document required to be filed.

The indictment, however, attempts to charge as a crime the alleged making of "false and misleading statements with respect to material facts in certain applications, documents and reports filed * * * with the New York Stock Exchange * * *." No charge anywhere appears that the petitioner made a statement *in* any application, report or document. The charge, if anything, is that McGloon made a statement "with respect to material facts" in some unspecified writing. In other words, he is charged only with having made false statements about something that was in the applications, reports and documents, not false statements in the applications, documents and reports themselves.

It is manifest from a reading of the statute that the crime defined is that of willfully and knowingly making or causing to be made any statement *in* any application,

document or report required by law or regulation to be filed, which statement was false or misleading with respect to any material fact. The offending statement must be contained in the application, document or report so filed or required to be filed. The indictment herein does not accuse the petitioner of doing that which the statute forbids. It charges only that he made false and misleading statements *with respect to material facts* in certain applications, documents and reports required to be filed with the New York Stock Exchange by the Securities Exchange Act of 1934. The indictment thus seeks to go beyond the statutory condemnation and embrace activities foreign to the statute itself. The allegations of the indictment are consistent with innocence. The elements of the statutory offense are not alleged.

Examples readily suggest themselves which illustrate and underscore the distinction between the offense as defined in the statute and as charged in the indictment. Let us assume, for instance, that a financial statement was one of the documents required by the Securities Exchange Act of 1934 and the rules and regulations of the Securities and Exchange Commission to be filed with the New York Stock Exchange, and that one was accordingly filed; that it was in all respects and particulars correct; and that it showed the particular company, whose report it was, to be in bad condition. Now, let us assume further that petitioner stated to some one that the company was in sound condition, operating at a profit and had just filed with the Stock Exchange a statement reflecting this condition, when the fact, known to him, and as reported, was that it was unsound, operating at a loss and that the financial statement referred to reflected the true picture. Obviously, in doing so he would be making "false and misleading statements with respect to material facts in certain appli-

cations, documents and reports (to wit, the financial statement) filed and required to be filed with the New York Stock Exchange by the Securities Exchange Act of 1934" and would come squarely within the charge of the indictment. His conduct, however, clearly would fall outside the scope of the statute. The statute punishes the making of a statement *in* an application, document or report required by law or regulation to be filed, which statement is false or misleading with respect to a material fact. It does not prohibit the making of false statements with respect to material facts which appear in applications, documents or reports so filed.

That an indictment must contain the elements of the offense created by the statute is not open to argument.

United States v. *Carll* (1881), 105 U. S. 611;
Brenner, et al. v. *United States* (C.C.A. 2nd, 1922), 287 Fed. 636;
United States v. *Hess* (1888), 124 U. S. 483;
Williamson v. *United States* (1908), 207 U. S. 425, 447;
United States v. *Simmons* (1877), 96 U. S. 360;
Shaw v. *United States* (C.C.A. 8, 1923), 292 F. 339.

The objection hereunder is not a formal one, but one of substance. As in all criminal cases, the pleading, and the statute under which it is drawn, must be strictly construed in the light most favorable to the presumed innocence of the defendant. (*Prussian* v. *United States* (1931), 282 U. S. 675; *St. Louis Merchants' Bridge Terminal Ry. Co.* v. *United States* (C.C.A. 8, 1911), 188 Fed. 191; *United States* v. *J. H. Winchester & Co. Inc.* (C.C.A. 2, 1930), 40 Fed. (2) 472.) Of course, this does not mean that the

statute must be so narrowly interpreted as to defeat its obvious purpose and to reject the plain legislative intent. Rather, the effort must be at all times, wherever possible, so to construe the act as to achieve its full purpose. (*United States* v. *Corbett* (1909), 215 U. S. 233; *United States* v. *Wishnatzki, et al.* (C.C.A. 2, 1935), 77 Fed. (2d) 357.)

Nevertheless, where, as in the case at bar, a statute is enacted which creates and prescribes the punishment for a new offense, such statute must be strictly construed and must clearly state, among other things, the persons and acts coming within the scope of its condemnation. Defects in a statute cannot be supplied by implication or intendment nor can the statute be expanded by pleading or judicial construction to cover transactions not clearly embraced within it. (*United States* v. *Resnick, et al.* (1937), 299 U. S. 207; *United States* v. *Weitzel* (1918), 246 U. S. 533; *St. Louis Merchants' Bridge Terminal Ry. Co.* v. *United States, supra; United States* v. *Missouri Pac. Ry. Co.* (C.C.A. 8, 1914), 213 Fed. 169; *Northern Pac. Ry. Co.* v. *United States* (C.C.A. 8, 1914), 213 Fed. 162, aff'd *United States* v. *Northern Pacific Railway Company* (1916), 242 U. S. 190.)

In *St. Louis, etc.* v. *United States, supra,* the Court stated as follows at page 193:

> "A penal statute which creates and denounces a new offense, and the act under consideration is such a statute, should be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified as punishable by such a law. The definition of offenses and the classification of offenders are legislative and not judicial functions, and where, as in the case at bar, a penal statute is plain and unambiguous, the courts

> may not lawfully extend it to a class of persons who are excluded from its effect by its terms, nor by interpolation or construction after their commission make acts offenses which were not clearly such by the expressed will of the legislative department. The creation of an offense by *ex post facto* construction is as pernicious as its creation by an *ex post facto* law."

In *United States* v. *Missouri Pac. Ry. Co., supra,* at pages 174-175, the Court spoke to like effect as follows:

> "* * * The act created and denounced a new offense. The statute which creates a new offense and prescribes its punishment must clearly state the persons and the acts denounced. An act which is not clearly an offense by the expressed will of the legislative body before it was done may not be lawfully or justly made such by construction after it is committed, either by the interpolation of expressions, or by the expunging of its words by the judiciary. * * *"

As was aptly stated by this Court in *United States* v. *Noveck* (1926), 271 U. S. 201, 204:

> "* * * Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose to do so is plain. * * *"

It is plain from what has gone before that the indictment herein is fatally defective in that it fails to charge a crime.

CONCLUSION

For the foregoing reasons, it is submitted that the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

February 10, 1941.

Respectfully submitted,

FRED A. IRONSIDE, JR.,
Solicitor and Counsel for Petitioner.

APPENDIX

The Statutes Involved

Title 15, Section 78m, United States Code, relating to the filing of periodical and other reports under the Securities Exchange Act of 1934, provides in part as follows:

> "(a) Every issuer of a security registered on a national securities exchange shall file the information, documents, and reports below specified with the exchange (and shall file with the Commission such duplicate originals thereof as the Commission may require), in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—
>
> "(1) Such information and documents as the Commission may require to keep reasonably current the information and documents filed pursuant to section 78*l* of this title.
>
> "(2) Such annual reports, certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports, as the Commission may prescribe."

Title 15, Section 78ff, United States Code, relating to penalties, provides as follows:

> "(a) Any person who wilfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who wilfully and knowingly makes, or causes to be made, any statement in any application, report, or document

required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this chapter, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

"(b) Any issuer which fails to file information, documents, or reports pursuant to an undertaking contained in a registration statement as provided in subsection (d) of section 78o of this chapter shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States. (June 6, 1934, c. 404, Sec. 32, 48 Stat. 904, as amended May 27, c. 462, Sec. 9, 49 Stat. 1380.)

"(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 15 of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made

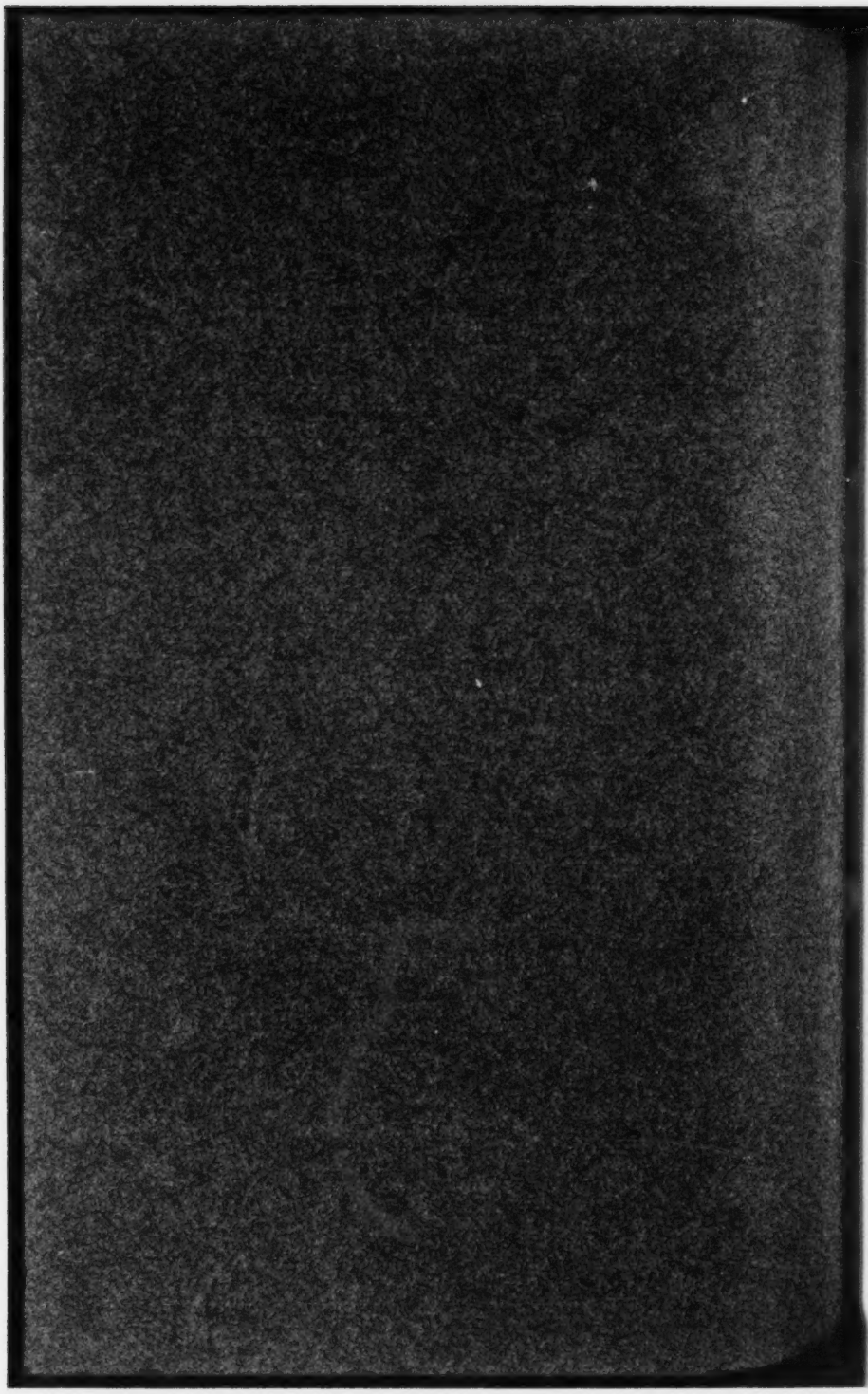
false or misleading with respect to any material fact. June 6, 1934, c. 404, Sec. 32, 48 Stat. 904, as amended May 27, 1936, c. 462, Sec. 9, 49 Stat. 1380; June 25, 1938, c. 677, Sec. 4, 52 Stat. 1076."

Title 15, Section 78w, United States Code, relating to power of the Securities and Exchange Commission and the Federal Reserve System to make rules and regulations provides:

"(a) The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this chapter, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

"(b) The Commission and the Board of Governors of the Federal Reserve System, respectively, shall include in their annual reports to Congress such information, data, and recommendation for further legislation as they may deem advisable with regard to matters within their respective jurisdictions under this chapter. (June 6, 1934, c. 404, Sec. 23, 48 Stat. 901, as amended Aug. 23, 1935, c. 614, Sec. 203 (a), 49 Stat. 704; May 27, 1936, c. 462, Sec. 8, 49 Stat. 1379.)"

[redacted]



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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 762

JOHN H. McGLOON, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinions were rendered by the District Court or the Circuit Court of Appeals.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 15, 1941 (R. 65–66). The petition for writ of certiorari was filed February 12, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Pro-

cedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the questions as to the constitutionality of the registration provisions of the Securities Exchange Act of 1934 are properly before the Court.

2. Assuming that they are, whether those provisions properly delegate rule-making power to the Securities and Exchange Commission and whether that portion of the statute under which petitioner was convicted sets up a fixed and definite standard of guilt.

3. Whether petitioner was subject to the provision of Section 32 (a) of the Securities Exchange Act of 1934, under which he was convicted.

4. Whether the count of the indictment upon which petitioner was convicted alleges that the false and misleading statements were made *in* the documents filed.

STATUTES INVOLVED

Petitioner was convicted under a provision of Section 32 (a) of the Securities Exchange Act of 1934, as amended, which makes it punishable for any person willfully and knowingly to make or cause to be made materially false or misleading statements in documents filed pursuant to the requirements of the Act and the rules and regulations

thereunder. The documents were filed pursuant to Section 13 of that Act which requires issuers of securities registered on a national securities exchange to file periodical reports in order to keep reasonably current data filed under Section 12 (b), the registration provision of the Act. Under both Sections 12 and 13, the Securities and Exchange Commission is authorized to prescribe, by rule and regulation, the detailed information to be filed. General rule-making provisions are contained in Section 23. A provision of Section 32 (a) penalizes the willful violation of any provision of the Act or rules thereunder. Separability of provisions is provided by Section 33. The text of these sections is set out in the Appendix, *infra*, pp. 15–20.

STATEMENT

On March 30, 1939, an indictment in fourteen counts was returned against the petitioner and eight others[1] in the District Court for the Southern District of New York (R. 1, 3–32). The first ten counts charged violations of the mail fraud statute (U. S. C., Title 18, Section 338); the eleventh, twelfth, and thirteenth counts, violations of Section 32 of the Securities Exchange Act of 1934, as amended (U. S. C., Title 15, Section

[1] The following defendants pleaded guilty to all counts of the indictment: Arthur Musica (R. 34, 40); Benjamin Simon (R. 35, 40); George Musica (R. 35, 40); Robert Musica (R. 35, 40); John O. Jenkins (R. 36, 41). The defendant Leonard Jenkins pleaded guilty to the fourteenth count (R. 36, 42).

78 ff.); and the fourteenth count, a conspiracy to violate the mail fraud statute and the Securities Exchange Act of 1934, as amended.

On April 5, 1939, the petitioner was arraigned and pleaded not guilty (R. 34, 39). No attack upon the indictment was made prior to trial (R. 33–37). On September 20, 1939, the United States Attorney furnished the petitioner with a letter of particulars (R. 46). No further particulars were sought by the petitioner. The case came to trial before a jury on March 7, 1940 (R. 35, 41), after which, on March 8, 1940, motions to dismiss each count of the indictment were denied (R. 35, 41).[2]

A verdict of guilty on count thirteen and not guilty on the remaining counts was returned by the jury as to the petitioner on May 18, 1939 (R. 37, 42).[3] Petitioner was sentenced to imprisonment for a year and a day and fined $5,000 (R. 37, 43).

Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of the trial court was affirmed *per curiam* (R. 65–66).

ARGUMENT

I

The petitioner's contention with respect to the constitutionality of the registration provisions of the Securities Exchange Act of 1934 (Sections 12

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[2] The grounds of petitioner's motion appear only in his assignment of errors (R. 50 *et seq.*).

[3] A verdict of not guilty was returned by the jury as to Horance B. Merwin and Rowley W. Phillips, the two defendants who stood trial with the petitioner (R. 37, 42).

and 13) are not properly before the Court, since petitioner was not charged with the violation of those provisions. The indictment[4] charged that on or about April 29, 1938, petitioner made and caused to be made false and misleading statements in reports filed pursuant to the Act and the rules and regulations thereunder (R. 23).

The charge was based upon that portion of Section 32 (a) which penalizes—

> any person who willfully and knowingly makes or causes to be made any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder * * * which statement was false or misleading with respect to any material fact. * * *

Petitioner is incorrect in arguing that he was charged with violation of the registration provisions of the Act, any rule thereunder, or any section of the Act other than this part of Section 32 (a). The indictment alleged that false statements were made and caused to be made in documents (R. 23–24)—

> filed and required to be filed with the New York Stock Exchange by the Securities Exchange Act of 1934, and in accordance with the rules and regulations prescribed by the Securities & Exchange Commission, which said rules and regulations were

[4] Whenever the indictment is referred to the reference is to Count 13, under which petitioner was convicted.

> necessary and appropriate for the proper protection of investors, and to insure fair dealing in connection with the securities of McKesson & Robbins, Inc., an issuer of securities registered on a national securities exchange, to wit, the New York Stock Exchange; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title 15, Sections 78m and 78ff, United States (Code.)

These allegations did not constitute a charge that the petitioner had not filed reports required by the registration provisions. On the contrary, it is plain that the only offense alleged was false filing. The parenthetical reference at the end of the count to Section 78m of Title 15 (Section 13 of the Act) merely identified the section under which the document was required to be filed. It was no part of the charge. *Williams* v. *United States,* 168 U. S. 382, 389; *Prussian* v. *United States,* 282 U. S. 675, 680–681.

Since petitioner was not charged with a violation of the registration provisions of the Act, he has no standing to question them. *Kay* v. *United States,* 303 U. S. 1; *United States* v. *Moriarity,* 106 Fed. 886 (C. C. S. D. N. Y.); *Securities and Exchange Commission* v. *Torr,* 15 Fed. Supp. 315 (S. D. N. Y.), reversed on other grounds, 87 F. (2d) 446 (C. C. A. 2d); cf. *Heald* v. *District of Columbia,* 259 U. S. 114.

In the *Kay* case, pursuant to the terms of the Home Owners Loan Act of 1933, a second mortgagee executed a consent to accept H. O. L. C. bonds in settlement of her claims. She falsely stated her claims and was indicted under the section of the statute providing that "whoever makes any statement knowing it to be false * * * for the purpose of influencing * * * the action of the Home Owners Loan Corporation * * * shall be punished * * *." This Court held that (pp. 6–7):

> When one undertakes to cheat the Government or to *mislead* its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or *mislead* is made are without constitutional sanction. * * * Apart from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the Act was being administered, and the separability provision of the Act (§ 9) is clearly applicable. *Utah Power Co.* v. *Pfost,* 286 U. S. 165, 184. (Italics ours.)

II

We have shown that petitioner is not entitled to raise the constitutional questions with respect to Section 13. In any event, it seems clear that

there is no merit to petitioner's point that Congress did not make adequate provision of legislative standards to guide the Commission in carrying out its administrative function of filling in the details.

The Securities Exchange Act of 1934 was passed following a Senate investigation of stock exchange practices, the buying, selling, and hypothecating of securities listed on stock exchanges, and various other related practices.[5] The investigation led to findings by the Congress, incorporated in the Act (Section 2; U. S. C., Title 15, Sec. 78 (b)), that—

> For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions: * * *.

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[5] See Senate Report 1455, 73d Congress, 2d Session.

To achieve such purposes, the Act provides, *inter alia,* for the registration of stock exchanges and for the registration of securities listed on such exchanges. Registration of a security is accomplished by the filing of an application which must contain certain specified information and documents concerning the issuer and the security. Section 12 (b) sets forth with particularity the subject matter and types of reports to be filed (Appendix, *infra,* pp. 15–17). Section 13 (Appendix, *infra,* p. 17) requires issuers of securities registered on a national securities exchange to keep reasonably current the information and documents specified in Section 12. Thus, it seems clear that in these sections Congress fully set forth the scope and nature of the information to be prescribed by the Commission.

Section 13 provides that the Commission can only require the specified information, documents, and reports in accordance with such rules and regulations as it finds "necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." A similar provision is contained in Section 12 (b) (2).

In *Wright* v. *Securities and Exchange Commission,* 112 F. (2d) 89 (C. C. A. 2d), the court below held that the "protection of investors is a sufficiently definite criterion to guide the Commission."

It is quite clear, we submit, that in Sections 12 and 13 Congress made ample provision of legislative standards for the Commission's rule-making power thereunder, and that the action of the Commission in providing the details under such precise legislative guidance is administrative in character.

The standard of guilt by which petitioner is to be judged must be found in the statutory provision under which he was indicted. That provision reads:

> * * * any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed * * * which statement was false or misleading with respect to any material fact * * *.

It is difficult to conceive of a more definite standard. The phrase "any statement * * * which * * * was false or misleading with respect to any material fact" contains two concepts—those of truth and materiality—concepts which are commonly applied not only by judge and jury, but by laymen in the conduct of their daily affairs. They are found in numerous Federal statutes.[6]

Substantially the same standards involved in this case were upheld in *Coplin* v. *United States,* 88 F.

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[6] See, for example, U. S. C., Title 18, Section 231; U. S. C., Title 18, Section 80; U. S. C., Title 12, Section 1467 (a); U. S. C., Title 8, Section 220 (c).

(2d) 652 (C. C. A. 9th), certiorari denied, 301 U. S. 703, where the offense charged was the obtaining of money by means of "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading," in violation of Section 17 (a) (2) of the Securities Act of 1933, c. 38, 48 Stat. 74 (U. S. C., Title 15, Sec. 77q (a) (2)).

That portion of Section 32 (a) under which the petitioner was indicted is certain and definite enough for any reasonable and well-intentioned individual to understand. *Kay* v. *United States,* 303 U. S. 1; *Omaechevarria* v. *Idaho,* 246 U. S. 343; *United States* v. *Shreveport Grain & El. Co.,* 287 U. S. 77; *Commonwealth* v. *Reilly,* 248 Mass. 1; *Jasnowski* v. *Connally,* 192 Mich. 139.

In support of his contention that Section 32 (a) sets forth no definite and ascertainable standard of guilt, petitioner argues that the standard is a subjective one because the reports, documents, and applications may differ from time to time pursuant to possible changes in the rules and regulations promulgated by the Securities and Exchange Commission (Br. 15). But the standard set forth in that portion of the statute under which petitioner was convicted remains fixed regardless of what documents or reports may be required to be filed. It is the simple standard of truth.

III

Petitioner contends that the indictment is faulty in that it does not allege petitioner to be a person subject to the provisions of Section 13 of the Act or any other section thereof. Section 13 requires issuers of securities registered on a national securities exchange to file specified documents. The indictment charged that the filing was made in connection with the securities of McKesson and Robbins, Inc., an issuer of securities so registered. Petitioner, an officer of McKesson and Robbins, Inc. (see R. 7), was alleged to have made and caused to be made materially false statements in the reports filed.

Obviously there was no charge of failure to file. On the contrary, the indictment alleged that the documents were filed with the New York Stock Exchange on or about a specified date. Since there was no charge of violation of Section 13, there was no need to allege that petitioner was within the class specified by that section.

Petitioner was found guilty of having violated that portion of Section 32 (a) which penalizes specified conduct on the part of "any person." That Congress did not intend to limit this subsection to particular classes of persons is clearly indicated by reference to subsection (b) of the same section. There the penalty provision specifically applies only to an issuer. See also Section 32 (c). A similar distinction is found in other

sections of the Act. Thus, subsections (a) and (b) of Section 9 (U. S. C., Title 15, Sec. 78i) make it unlawful for "any person" to engage in manipulative practices, while subsection (c) of Section 9 applies only to a "member of a national securities exchange." Section 10 (U. S. C., Title 15, Sec. 78j) applies to "any person." Section 15 (c) (U. S. C., Title 15, Sec. 78o) proscribes certain conduct on the part of brokers and dealers. If Congress had intended by Section 32 (a) to limit criminal responsibility for false statements made in the described documents to a particular class of persons, it would have so stated, as it did in analogous instances throughout the Act.

It would seem clear, therefore, that the crime charged did not require allegation and proof that the offender was an issuer or member of any specified class.

IV

Petitioner claims that the indictment does not charge an offense under Section 32 (a) in that it fails to charge the making of false statements *in* the documents required to be filed. The indictment alleges that the defendants "did make and cause to be made false and misleading statements with respect to material facts in certain applications, documents, and reports filed" (R. 23). Petitioner tortures this language to mean that the false statements were made *dehors* the documents with respect to facts contained in the documents.

In effect, petitioner's contention that the charge is fatally defective rests upon the absence of commas preceding and following the phrase "with respect to material facts." The contention is clearly frivolous since the intendment of the indictment's language is plainly that the defendant made materially false and misleading statements *in* the documents which were filed.

CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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WENDELL BERGE,
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General Counsel,
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Attorney,
Securities and Exchange Commission.

MARCH 1941.

APPENDIX

The sections of the Securities and Exchange Act of 1934, c. 404, 48 Stat. 881, which are as amended, pertinent in the consideration of this case are set out herein.

Section 12 (U. S. C., Title 15, Sec. 781):

REGISTRATION REQUIREMENTS FOR SECURITIES

SEC. 12. (a) It shall be unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange in accordance with the provisions of this title and the rules and regulations thereunder.

(b) A security may be registered on a national securities exchange by the issuer filing an application with the exchange (and filing with the Commission such duplicate originals thereof as the Commission may require), which application shall contain—

(1) Such information, in such detail, as to the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer, and any guarantor of the security as to principal or interest or both, as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, in respect of the following:

(A) the organization, financial structure and nature of the business;

(B) the terms, position, rights, and privileges of the different classes of securities outstanding;

(C) the terms on which their securities are to be, and during the preceding three years have been, offered to the public or otherwise;

(D) the directors, officers, and underwriters, and each security holder of record holding more than 10 per centum of any class of any equity security of the issuer (other than an exempted security), their remuneration and their interests in the securities of, and their material contracts with, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer;

(E) remuneration to others than directors and officers exceeding $20,000 per annum;

(F) bonus and profit-sharing arrangements;

(G) management and service contracts;

(H) options existing or to be created in respect of their securities;

(I) balance sheets for not more than the three preceding fiscal years, certified if required by the rules and regulations of the Commission by independent public accountants;

(J) profit and loss statements for not more than the three preceding fiscal years, certified if required by the rules and regulations of the Commission by independent public accountants; and

(K) any further financial statements which the Commission may deem necessary or appropriate for the protection of investors.

(2) Such copies of articles of incorporation, bylaws, trust indentures, or corresponding documents by whatever name known, underwriting arrangements, and other similar documents of, and voting trust agreements with respect to, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer as the Commission may require as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security.

* * * * *

Section 13 (U. S. C., Title 15, Sec. 78m):

PERIODICAL AND OTHER REPORTS

(a) Every issuer of a security registered on a national securities exchange shall file the information, documents, and reports below specified with the exchange (and shall file with the Commission such duplicate originals thereof as the Commission may require), in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) Such information and documents as the Commission may require to keep reasonably current the information and documents filed pursuant to section 78 l of this title.

(2) Such annual reports, certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports, as the Commission may prescribe.

Section 23 (U. S. C., Supp. V, Title 15, Sec. 78w):

RULES AND REGULATIONS; * * *

(a) The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this chapter, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

Section 32 (U. S. C., Supp. V, Title 15, Sec. 78ff):

PENALTIES

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this chapter, which statement was false or misleading

with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports pursuant to an undertaking contained in a registration statement as provided in subsection (d) of section 78o of this chapter shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 15 of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact. June 6, 1934, c. 404, Sec. 32, 48 Stat. 904, as amended May 27, 1936, c. 462, Sec. 9, 49 Stat. 1380; June 25, 1938, c. 677, Sec. 4, 52 Stat. 1076.

Section 33 (U. S. C., Title 15, Sec. 78gg):

Separability of provisions.—If any provision of this chapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the chapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

U. S. GOVERNMENT PRINTING OFFICE: 1941